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August 18, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re *Ex Parte* Presentation – *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*
CC Docket Nos. 02-33, 98-10, 95-20

Dear Ms. Dortch:

On August 15, 2003, Dave Baker, Vice President for Law and Public Policy of EarthLink, Inc., and the undersigned met with Scott Bergman, Legal Advisor to Commissioner Adelstein, to discuss the above-referenced proceedings.

EarthLink discussed its position described in documents previously filed in the above-referenced dockets. EarthLink described its experience as a major independent Internet service provider (ISP) delivering DSL-based high speed Internet access to hundreds of thousands of consumers in the U.S. Demonstrating the importance of customer choice in DSL-based ISPs, EarthLink explained that it just this month won the J.D. Power and Associates Award for Highest Customer Satisfaction Among High-Speed Internet Service Providers for the second year in a row. A copy of the EarthLink press release is attached hereto and was provided to Mr. Bergman along with the attached EarthLink informational materials. EarthLink also explained how independent ISPs add value to consumers' online experience by offering unique products and services such as EarthLink's Pop-Up Blocker, spamBlocker and upcoming SpyBlocker.

EarthLink emphasized that ISPs rely on nondiscriminatory access to Bell Operating Company (BOC) networks and that it is critical for ISP competition to retain such principles. An FCC decision that does not include nondiscriminatory access safeguards would impede investment in broadband ISP services and would create legal uncertainty. This would be contrary to the continued deployment, adoption and quality of broadband Internet services. EarthLink explained that BOCs have incentive to control the retail relationship with end users, even though BOCs gain revenues when they wholesale DSL transport services to independent ISPs.

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EarthLink discussed that BOC DSL services have been classified as Title II "telecommunications services" in several FCC decisions and that this continues to be the appropriate classification under a *NARUC I* analysis EarthLink agreed that the FCC should seek to streamline regulation when and if the market for wholesale transmission changes, and noted that the FCC may forbear or waive its regulatory approach under Title II, as appropriate, in order to rely more on enforcement rather than specific regulatory proscriptions EarthLink also explained that discrimination in BOC transmission service offerings would negatively impact and frustrate information service investment and competition EarthLink also discussed and provided a copy of the attached proposed ISP access rule of EarthLink, MCI, and AOL Time Warner (filed in the above-referenced dockets on May 1, 2003) EarthLink emphasized that BOCs can arrange private contracts with ISPs today on a number of nonregulated services and use tariffed services as inputs, such as the EarthLink-BellSouth RBAN agreement Regulations or tariffing do not significantly slow or impede such contractual arrangements and, indeed, help to reach an agreement that is fair

EarthLink emphasized that the use of Title I authority as some BOCs have proposed would create substantial legal and regulatory uncertainty There may be no legitimate nexus for the proposed exercise of Title I authority, and such a decision would be at risk of being overturned

Finally, EarthLink discussed the complex issues of cost allocation and enforcement that would arise with a shift of BOC advanced services from Title II to Title I authority. As the MCI July 29, 2003 and the AT&T July 31, 2003 letters have previously presented in CC Dkt No 02-33, cost allocation issues must be resolved to avoid serious cross subsidy of BOC unregulated interstate services by intrastate regulated voice services not subject to substantial competition. Further, it is untested whether the FCC could provide effective enforcement of potential Title I ISP safeguards using its Section 208, which attaches only to Title II common carriers

Pursuant to the Commission's Rules, six copies of this letter/memorandum are being provided to you for inclusion in the public record in each of the above-captioned proceedings Should you have any questions, please contact me

Sincerely,

Mark J O'Connor
Counsel for EarthLink, Inc

CC Scott Bergman, Esq
Qualex

FOR IMMEDIATE RELEASE

David Blumenthal
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EARTHLINK HIGH SPEED INTERNET SERVICE RANKED HIGHEST IN CUSTOMER SATISFACTION BY J.D. POWER AND ASSOCIATES

EarthLink Garners Top Honors for Second Consecutive Year

ATLANTA, Aug. 5, 2003 – EarthLink (NASDAQ: ELNK), one of the nation's leading Internet service providers, today announced that its high-speed Internet service has been recognized by J.D. Power and Associates in its 2003 Internet Service Provider Residential Customer Satisfaction Study℠ with the highest ranking in customer satisfaction for the second year in a row.

"J.D. Power and Associates sets the standard for excellence and achievement, and being singled out for overall customer satisfaction for the second year in a row reinforces our commitment to provide the best Internet experience to EarthLink subscribers," said Karen Gough, executive vice president of marketing for EarthLink. "This honor will help to further differentiate our high speed service, which continues to play a prominent role in EarthLink's overall growth strategy."

Consumers participating in the J.D. Power and Associates Internet Service Provider Residential Customer Satisfaction Study℠ rated both national and regional ISPs on seven different factors that comprise the overall customer satisfaction index. EarthLink's top position among broadband providers results from receiving the highest scores in the industry for customer service, e-mail services, cost of service, billing, image, and offerings and promotions.

As part of EarthLink's commitment to customer satisfaction, the company is aggressively rolling out new products and services to further extend its value proposition. These features, available to all EarthLink High Speed subscribers include spamBlocker, which eliminates virtually 100 percent of all junk e-mail messages, and Pop-up Blocker™, which helps block annoying pop-up ads.

About EarthLink High Speed Internet

With more than 993,000 high-speed subscribers, EarthLink is one of the country's leading broadband Internet service providers. EarthLink is the only ISP to offer high-speed Internet access nationally through all three major broadband technologies: cable, DSL and two-way satellite. Ranging in price from just $39.95 - $49.95 per month, EarthLink offers a broadband option for every budget and need. For more information about this or other EarthLink high-speed products, please call 877-657-6895 or visit http://www.earthlink.net/home/broadband

About J.D. Power and Associates

Headquartered in Westlake Village, Calif., J.D. Power and Associates is an ISO 9001-registered global marketing information services firm operating in key business sectors including market research, forecasting, consulting, training and customer satisfaction. The firm's quality and satisfaction measurements are based on responses from millions of consumers annually.

About EarthLink

EarthLink is the Internet service provider (ISP) solution for an impatient world. Headquartered in Atlanta, EarthLink has earned a national reputation for outstanding customer service, its suite of online products and services, and is ranked Highest in Customer Satisfaction Among High-Speed ISPs, according to J.D. Power and Associates. EarthLink tied for the highest score among high-speed providers in the 2002 study. Serving approximately five million subscribers, EarthLink offers what every user should expect from their Internet experience: high-quality connectivity, minimal drop-offs and ISP-generated intrusions, and customizable features. Whether it's dial up, high-speed, Web hosting, or wireless Internet service, EarthLink provides the tools that best let individuals use and enjoy the Internet on their own terms. Learn more about EarthLink by calling (800) EARTHLINK, visiting EarthLink's Web site at www.earthlink.net.

# # #

PROPOSAL TO STREAMLINE TITLE II REGULATION OF BOC ADVANCED SERVICES TO PROMOTE DIVERSE INFORMATION SERVICES

Proposed Title II ISP Access Rule: New Section 64.702(c)

§ 64.702(c) Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner

(1) Access to Transmission Services and Capabilities

Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions. Such offerings shall be separate from any other BOC services, including enhanced or information services.

(2) Transparency

(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall

(i) File an interstate tariff with the Commission describing such rates, terms, and conditions, or

(ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions.

(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information.

(i) the term (including renewal option) of the contract,

(ii) a description of the high-speed network transmission services and capabilities provided under contract,

(iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts, and

(iv) all other classifications, terms or practices affecting the contract rate.

(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities. In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.

(3) Access to New Transmission Services and Capabilities

(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions

(B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause

(C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either

(i) how the BOC will offer the requested access within 90 days of the request, or

(ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable

(4) Definitions For purposes of this subsection (c)

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction

Proposed New Rule For Enforcement of ISP Access §1 737

§1 737 ISP Complaints Regarding Rule Section 64 702(c)

(a) Where a complaint alleges a violation of FCC Rule Section 64 702(c), the following additional procedures shall also apply

(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (e g , records of OSS configurations, ordering processes, data on specific orders or maintenance records, etc), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64 702(c)

(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64 702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64 702(c) Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case, the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion

(b) After the 15-day response period has elapsed under FCC Rule §64 702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations

(c) Except if a complaint alleging a violation of FCC Rule § 64 702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64 702(c) within 180 calendar days from when such complaint is accepted for filing

EXPLANATION

This rule is proposed to streamline regulation of the former Bell Operating Companies' ("BOCs'") wireline broadband services under Title II of the Communications Act consistent with the public interest. The proposed rule presents a significant streamlining of the various and sometimes overlapping Title II *Computer Inquiry* obligations for broadband (advanced and/or high-speed) services that currently apply to the BOCs, including all affiliated BOC providers of telecommunications. The proposal supplants the current *Computer Inquiry* obligations for BOC wireline broadband services, set forth in myriad FCC orders and precedent, with a set of Title II rules that are deregulatory, simple, flexible and enforceable and that establish clear access for information service providers ("ISPs") to BOC advanced services and networks to enable ISPs to provide a diversity of competitive information services to the public. Further, to assure enforcement of these streamlined access obligations, the proposal includes new procedures, in a new FCC Rule Section 1.737, described below, for handling ISP formal complaints against BOCs. Under the proposed streamlined Title II rules, ISP access to the wireline broadband transmission components of the BOC networks would provide the essential framework for a vibrant information services market that will, in turn, lead to a number of proven consumer benefits, including robust price and service competition among BOC-affiliated and unaffiliated ISPs, creating innovation, diversity and demand for broadband services.

Under this approach, the Commission could eliminate for wireline broadband services current FCC rule sections 64 702(c) and (d) and the particular requirements set forth in the *Computer Inquiry* precedent, and adopt instead a simplified FCC rule section 64 702 (c)(1)-(4), setting forth BOC Title II obligations in a simple, comprehensible and streamlined manner More specifically, the proposed rules would eliminate for wireline broadband services a variety of specific *Computer III* and *Computer II* obligations, stated in various FCC orders, including certain Comparably Efficient Interconnection ("CEI") obligations, such as the nine CEI parameters, Open Network Architecture ("ONA") unbundling obligations, CEI procedural obligations, such as CEI plan maintenance, reporting, and web-posting; ONA plan maintenance and prior FCC approval for ONA plan changes; reporting/filing obligations such as the Annual ONA Report, Semi-Annual ONA Report, Quarterly Nondiscrimination Report, and Annual Officer Affidavit, obligations to tariff the *Computer III* basic service elements ("BSEs") and basic service access arrangements ("BSAs"), and the current rule section 64.702(c) regarding a *Computer II* separate subsidiary

I. NEW SECTION 64.702 (C)

Proposed Title II ISP Access Rule: New Section 64.702(c) (1)

§ 64 702(c) Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner

(1) Access to Transmission Services and Capabilities Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions Such offerings shall be separate from any other BOC services, including enhanced or information services.

Explanation of § 64.702(c)(1):

The proposed Title II rule is intended to take a broad and "bright-line" approach for all ISPs to have access to the same functionalities of the BOC wireline broadband networks,

including installation and maintenance of such functionality, whether used by unaffiliated or affiliated ISPs The relevant definitions in new § 64 702(c)(4) make clear that associated functions for ordering, repairing and/or signaling continue to be a key component for competition among ISPs and for rapid deployment to the public, and thus the proposed rule ensures openness of the BOC network, as well as associated functions, systems and databases

Building on the core Title II obligations of Sections 201(b) and 202(a) of the Communications Act barring discriminatory and unreasonable practices, this rule would ensure that the BOCs provide ISPs with access that is not only reasonable, but that is also equal and nondiscriminatory with the treatment and access the BOC provides to its own ISP operations and to other ISPs for broadband services Thus, for example, if a BOC-affiliated or preferred ISP has access to electronic OSS, databases, or other systems, then the BOC must ensure that competing ISPs have substantially equivalent access Further, consistent with nondiscrimination, if BOCs collocate information service equipment of affiliated or preferred ISPs, the BOCs would impute reasonable transport costs in a manner similar to minimization of transport precedent In general, the FCC's Title II precedent, including information services precedent, would inform the Commission's interpretation and enforcement of the new rule. In this way, all ISPs will have maximum opportunity to compete and maximum incentive to create high quality, low price and valuable services for consumers

As the BOCs introduce new broadband services, they must also reasonably offer access to competing ISPs and continue to offer services relied upon by ISPs and their customers. ISPs, for example, have deployed substantial high-speed information services to the public relying upon a dedicated and reliable connection for the customer, and it would be unreasonable, and a rule violation, for the BOC to discontinue or degrade such services.

Proposed Transparency Requirement: New Section 64.702 (c) (2)

(2) Transparency

(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall

(i) File an interstate tariff with the Commission describing such rates, terms, and conditions, or

(ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions

(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information.

(i) the term (including renewal option) of the contract,

(ii) a description of the high-speed network transmission services and capabilities provided under contract,

(iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts, and

(iv) all other classifications, terms or practices affecting the contract rate

(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance

Explanation of § 64.702(c)(2):

This subsection of the proposed rule would streamline for wireline broadband services the *Computer II* and *Computer III* requirements that BOCs tariff (with the Commission and/or state regulatory agencies) the elements of the broadband services and instead proposes an alternative approach to transparency At the same time, BOCs would still be required to provide service to ISPs, including affiliated ISPs, on rates, terms and conditions that are transparent and publicly available for all ISP customers and competitors This rule does not restrict the BOC's ability to

establish broadband rates or terms that are novel or tailored to the needs of specific classes of ISP customers, such as low-volume or high-volume arrangements

Under the proposal, the BOC may choose whether to use existing FCC tariffing processes for BOC wireline broadband services or to web post rates, terms, and conditions, similar to the way that FCC rules require nondominant interexchange carriers to webpost their rates, terms and conditions *See* 47 C F R § 42 10 The rule also makes clear in subsection 64.702(c)(2)(B) that in the event the BOC enters into an individual case basis contract with any ISP for high-speed network transmission services and capabilities, it must continue to make public the basic parameters of such contract, consistent with requirements governing contract tariffs today. *See* 47 C F R § 61 55(c) The requirement of prior notice in subsection 64.702(c)(2) to existing ISP customers will ensure that ISPs are provided advance information should the BOC intend to make changes to the services upon which the ISPs and their customers rely In addition, given that ISPs have deployed significant high-speed information services to the public relying upon BOC services and capabilities, this rule would require 120 days notice for discontinuance, to allow the ISP to transition reasonably to a new service or to request continuation of the service pursuant to subsection 64 702(c)(3).

By its operation, the rule would require the BOC to meet all of its safeguard obligations; in the case of a rule violation, the Commission would have authority to order any equitable or compensatory relief, as it deems appropriate to remedy the matter.

Proposed New Capabilities Requirement: New Section 64.702(c) (3)

(3) Access to New Transmission Services and Capabilities

(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions

(B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause

(C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either

(i) how the BOC will offer the requested access within 90 days of the request, or

(ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable

Explanation of § 64.702(c)(3):

To promote full and robust wireline broadband information services competition, with its proven and clear consumer welfare benefits, the proposed rule ensures that as new services, capabilities and functionalities emerge, consistent with the evolution of technology and network design, ISPs have continuing access so that they can provide innovative broadband information services to their customers The rule would also enable ISPs to continue using services that the BOCs may seek to discontinue for their own ISPs by requesting such access as a "new" service Once the BOC provides a service pursuant to this subsection, that service would be offered pursuant to the terms of subsections 64 702(c)(1) and (2), requiring just, reasonable and nondiscriminatory rates, terms and conditions and transparency, to allow all ISPs to avail themselves of the offering

The proposed rule would eliminate for wireline broadband services the sometimes complex and cumbersome ONA process, which includes ONA plans, ONA plan amendments, the Annual and Semi-Annual ONA Report, and similar specific requirements that are related to these obligations The proposed rule would also eliminate for wireline broadband services ONA reporting and other ONA safeguards and, instead, require a simple process for service requests, with marketplace negotiations and enforceable ISP rights of access

The ability of unaffiliated ISPs to introduce new information services depends on their ability to obtain access arrangements that are otherwise not in use specifically by the BOC ISP While this was a central tenet of the ONA process, the proposed rule greatly simplifies for wireline broadband services the former process and regulatory framework. *Third Computer Inquiry*, Report and Order, 104 F C C 2d 958, 1064-66 (1986) Thus, ONA plans, amendments, reporting and record keeping are not the focus of the new approach If an ISP makes a legitimate request for a new wireline broadband service or capability, however, then it is vitally important for the BOC to offer such access in an expeditious manner, since otherwise new broadband information services will not reach the market and, equally important, the BOC ISP could strategically limit or delay its use of services or capabilities to prevent competitive new broadband services from reaching consumers. Under this rule, the BOC would be required to respond to ISP requests for new wireline broadband service transmission services and capabilities with reasonable rates and terms of service The right to request and, if necessary, follow up with an enforcement action would establish a minimum of regulation and an enforceable right for the introduction of creative new information services to the American public

Proposed Definitions: New Section 64.702(c) (4)

(4) Definitions For purposes of this subsection (c)

"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features

"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction

Explanation of § 64.702(c)(4):

The definitions of the proposed rule are designed to encompass for wireline broadband offerings the type of functionalities, services and capabilities referenced throughout the

Computer Inquiry proceedings, including functionality necessary for ISPs to provide broadband-based services to consumers such as OSS and similar capabilities. The definitions are premised on the principle that access is only viable if it can be used efficiently. The definition of "high-speed network" tracks the definition previously adopted by the FCC *See Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities*, Third Report, 17 FCC Rcd. 2844, ¶ 7 (2002) (As it has done in prior reports on advanced services, FCC adopts "the term 'high-speed' to describe services with over 200 kpbs capability in at least one direction")

II. NEW SECTION 1.737 – ENFORCEMENT

Proposed New Rule For Enforcement of ISP Access Rule – § 1.737

§1 737 ISP Complaints Regarding Rule Section 64 702(c)

(a) Where a complaint alleges a violation of FCC Rule Section 64 702(c), the following additional procedures shall also apply

(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (including records of OSS configurations, order processes, data on specific orders or maintenance records, high-speed network transmission services and capabilities deployment, etc), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64.702(c)

(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64 702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64.702(c). Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case, the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion

(b) After the 15-day response period has elapsed under FCC Rule §64 702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations

(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64 702(c) within 180 calendar days from when such complaint is accepted for filing

Explanation of § 1.737:

The proposed rule would facilitate significant streamlining of the various Title II *Computer II* and *Computer III* obligations, as explained above, by providing ISPs with effective enforcement in complaint actions when significant BOC misconduct has occurred. As a Title II-based rule, Section 208 and existing FCC and judicial precedent would remain relevant to determine what is just, reasonable and/or nondiscriminatory under the Communications Act

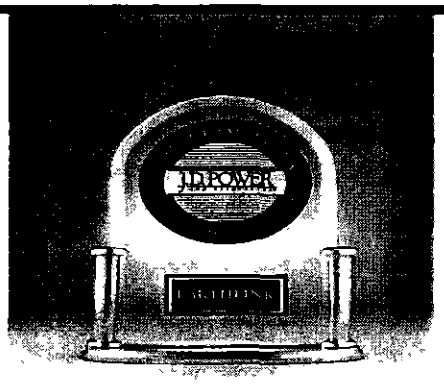
The proposed rule reflects the fact that due to ISP reliance upon the BOCs, the BOC controls much of the information relevant to a fair and accurate determination of whether a rule violation has occurred It is the BOC that controls the OSS systems, maintenance records, configurations of systems, and access to the transmission components and capabilities, as well as the ability to modify those things for its benefit Typically, the ISP does not have access to this information, especially in cases where discriminatory practices are alleged To address this disparity, various *Computer Inquiry* obligations imposed several reporting and certification obligations to ensure nondiscrimination and transparency by the BOC. The proposed deregulatory approach, however, eliminates for wireline broadband services BOC reporting and similar obligations Instead, to ensure the effective administration of justice, the protection of the public interest, and to avoid the potential for pre-litigation evidence destruction, the BOC is held responsible for producing all necessary information to resolve any complaints that may arise If the BOC cannot do so or has chosen record maintenance or retention systems that are inadequate for the Commission to resolve the dispute, then the burden is placed properly on the BOC to demonstrate that no rule violation has occurred This limited shift of burden is consistent with FCC and judicial precedent in cases where the defendant has failed to produce evidence within its exclusive access or control that is necessary for adjudication of the dispute. FCC rules and

precedent are wholly consistent with this approach *Cf* 47 C.F.R § 64 1150(d) *See also, In the Matter of WorldCom, Inc* , Order, DA 02-2569 (rel Oct 8, 2002); *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, ¶ 278 (1997), *In re Complaint of L Douglas Wilder and Marshall Coleman Against Station WRIC-TV Petersburg, Virginia*, Further Discovery Order, 12 FCC Rcd 4111, ¶27 (1997). Indeed, Part 42 of the Commission's rules requiring carriers to retain certain records, 47 C.F R § 42 1 *et seq* , "was established to ensure the availability of carrier records needed by this Commission to meet its regulatory obligations " *In the Matter of Revision of Part 42*, Report and Order, 60 R R 2d (P&F) 1529, ¶ 2 (1986)

In addition, because experience has shown that enforcement delay can effectively become a denial of access in the rapidly moving broadband information services arena, the rule would require resolution of complaints within 180 days For the same reasons, it is assumed that the Enforcement Bureau would make more frequent use of the accelerated docket process to resolve cases of enforcement of the ISP access rule

RECENT AWARDS

EarthLink™



August 2002

2002 Highest in Customer Satisfaction Among High-Speed Internet Service Providers in a Tie and Highest in Customer Satisfaction Among Dial-Up Internet Service Providers - J.D. Power and Associates — EarthLink has received the Highest Ranking in Customer Satisfaction Among Dial-up ISPs and tied in the ranking for Highest Customer Satisfaction Among High-Speed ISPs, according to J.D. Power and Associates 2002 Syndicated Internet Service Provider Residential Customer Satisfaction Study℠

"We are proud to have garnered these rankings in such a prestigious and customer-focused study," said Karen Gough, EarthLink's executive vice president of marketing. "J.D. Power and Associates has always defined the standard for excellence, and these rankings once again demonstrate our commitment to providing the very best Internet experience to our subscribers."

J.D. Power and Associates 2002 Syndicated Internet Service Provider Residential Customer Satisfaction Study℠. Study conducted among national and regional ISP's and based on 4,629 responses. www.jdpower.com

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The source for computers and technology

April 2002

2002 CNET Editors' Choice Award — Citing EarthLink's (Nasdaq: ELNK) "cool tools and reliability," CNET for the third consecutive year has awarded top honors to EarthLink in its annual review of Internet service providers (ISP).

In an article titled *Dialing for dollars: we compare five major dial-up ISPs*, CNET writes, "EarthLink gets our nod as the best among the major dial-up ISPs. Why? The service helps you get started, then steps humbly out of the way. It offers easy-to-use tools and doesn't pester you with ads or spam. And, to top it off, EarthLink provides highly reliable service and surprisingly good support for a reasonable $22 a month."

ZIFF DAVIS SMART BUSINESS

March 2002

2002 Ziff Davis Smart Business "Five-Star Award" — EarthLink has received the only five-star rating among Internet service providers (ISP) from the editors of *Ziff Davis Smart Business*. The magazine selected the Atlanta-based ISP as its "top pick," citing EarthLink's easy installation, abundance of local-access dial-up numbers and array of broadband choices, including cable, DSL and satellite high-speed access. In a review titled *Deathmatch: Internet Service Providers*, Gordon Bass writes, "The Net, the way you want it. Remarkably simple to install," and "Fastest time for a 1MB download with a 56Kbps connection."

Ziff Davis Smart Business 5-Star Award Logo is a trademark of Ziff Davis Publishing Holdings Inc.

Mobile Computing
communications

October 2001
&
February 2000

2001 Mobile Computing's "First Class Award" — They write, "Once again, our First Class Award goes to EarthLink, but not just for providing a fast and reliable connection to the Internet without pop-up ads. This international ISP has rounded out its offerings by adding two pricing plans — and more important, by supporting a wide variety of wireless-access devices."

2000 Mobile Computing's Best ISP Award — Both EarthLink and MindSpring were named best Internet service provider in Mobile Computing's editorial review. "Based on these factors [ability to connect to the Internet in a variety of ways and the time it took to connect], two companies which are soon to be one, came out on top."

ZDNet INTER@CTIVE WEEK ONLINE

June 4, 2001

2001 Inter@ctive Week's "Top Internet Service Provider" Award — For the second year in a row, EarthLink was honored with another award from Inter@ctive Week. This year, IT managers rated EarthLink the "Top Internet Service Provider" in a survey. "No Internet service provider is more deserving of a top spot in the ISP category than EarthLink. Number one fights hard to become a real alternative to America Online."

MVP 2001 SMART BUSINESS

March 2001

2001 Ziff Davis Smart Business' "Best of the Best" Award — Formerly *PC Computing*, *Ziff Davis Smart Business Magazine* awarded EarthLink its second straight MVP award for best ISP while EarthLink Biz was named a Web Hosting finalist. The magazine writes "[EarthLink] comes in first place for easy access to the Net from just about anywhere in the 50 states. What else could you want?"

washingtonpost com

EarthLink to Offer Anti-Spam E-Mail System

'Challenge-Response' Technology Rejects Messages Unless Senders Are Cleared by Recipients

By Jonathan Krim
Washington Post Staff Writer
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A system that backers claim will eliminate e-mail spam is about to be deployed by a major Internet service provider, giving a boost to an emerging technology that if widely adopted would change how people communicate online.

Atlanta-based EarthLink Inc., the country's third-largest provider of for-pay e-mail accounts, will roll out test versions of the system for its 5 million subscribers this month.

Known as "challenge-response" technology, the system thwarts the ability of spammers to reach their intended audience with millions of automatically generated e-mails. When someone sends an e-mail to a challenge-response user, he or she gets an e-mail back asking to verify that the sender is a live person.

Once the sender does that by replicating a word or picture displayed on the screen, the original e-mail is allowed through. The system automatically recognizes future e-mails from the same sender, so the verification needs only to be performed once. Without the verification, the e-mail is not delivered.

Some experts see problems with the technology and doubt that consumers will warm to a process that adds another step to e-mail delivery. The technology is available from a handful of small vendors for a fee, but the customer base is small.

EarthLink is betting that customers will put up with a little extra effort in order to stem the tide of unsolicited messages pushing diet fads, get-rich schemes and pornography.

Like arch rivals America Online Inc., Microsoft Corp. and Yahoo Inc., EarthLink has spent millions of dollars developing software to block spam. But spammers have found ways to defeat them and spam accounts for 40 percent of all e-mail

"The limitations on filters are truly very daunting," said James Anderson, EarthLink's vice president of product development. Even as filters improve, users must constantly adjust them so that they don't block messages they want to receive, he said.

The challenge-response system will be optional and free for EarthLink subscribers, Anderson said. It will allow users to automatically clear the e-mail addresses of friends, family members and other associates in their electronic address books, so those people would not receive the challenge e-mail.

Executives at EarthLink's three top competitors, who recently formed a coalition to combat spam, said they are evaluating challenge-response technology. Yahoo and Microsoft's MSN and Hotmail networks already employ challenge-response when someone seeks to open an e-mail account.

Yahoo also recently started using a variation of the system when an account holder is sending high volumes of mail, to crack down on spammers using Yahoo accounts.

America Online spokesman Nicholas J Graham said that for now, AOL is concerned about putting too many burdens on users and that the technology is "not a one-size-fits-all panacea."

In addition to requiring senders to verify themselves, users would have to use special e-mail addresses when registering to purchase goods online, because vendors often send sales confirmation notices by computer. The special addresses are designed to route such messages to a user's regular in-box.

The new system could slow delivery of some e-mail. For instance, a sender might walk away from his or her computer after sending an initial message, not noticing until hours later that a challenge had come back.

Phil Goldman, chief executive of Mailblocks Inc , a Silicon Valley start-up that provides a challenge-response service, said people will quickly get over those hurdles.

"It's about social habits," said Goldman, a former Microsoft executive whose service launched a month ago. "When the rotary telephone first came out, people said, 'You mean I have to dial seven numbers?' "

Goldman said developers of the Mailblocks system own patents on the challenge-response technology. His company already is seeking to enforce its two patents against another small provider of the technology, Spam Arrest LLC of Seattle.

Brian Cartmell, manager at Spam Arrest, said his company is vigorously contesting the Mailblocks claim. He said Spam Arrest, which has been operating since April 2002, has "many thousands" of customers but he declined to be more specific.

Anderson said Goldman's patent claims are "not relevant" to the product EarthLink developed inside the company

Goldman acknowledged that the system is in its infancy and needs ongoing refinement. It is probably not best suited for businesses that sell directly to customers, he said, because consumers might resent having to send verification when they want to make a purchase.

Others see deeper problems.

"Challenge-response will indeed block the vast majority of spam," said John R. Levine, a computer consultant and co-author of "The Internet for Dummies." But he said a lot of people will never respond to a challenge, or will think the challenge e-mail itself is spam.

Levine said that already, spammers are disguising e-mails as challenges to get people to open the messages And he worries that if large numbers of people begin to use the system, user address books will be a target of hackers seeking to obtain lists of approved addresses.

Some viruses launch attacks using computer address books, and if that happened, confidence in the challenge-response system would erode, Levine said.

"The consequences of spammers' response to challenge-response will be really ugly," Levine said.

Boosters of the system remain confident that challenge-response can effectively combat spammers' attempts to sabotage the process "This is as close as there is to the silver bullet" against spam. Anderson said